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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
DISPATCH

In the Matter of)

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection Through
Physical Collocation for Special
Access and Switched Transport)

CC Docket No. 93-162

ORDER ON RECONSIDERATION

Adopted: October 8, 1997; Released: October 10, 1997

By the Commission:

I. INTRODUCTION

1. On July 14, 1997, Ameritech filed a petition for partial reconsideration of the refund requirement in the *Physical Collocation Investigation Final Order*.¹ Specifically, Ameritech seeks reconsideration of that Order's physical collocation overhead loading prescriptions and refund requirements. MCI Telecommunications Corporation (MCI) filed an opposition to Ameritech's petition, and Ameritech filed a reply. For the reasons discussed below, we deny Ameritech's petition.

II. BACKGROUND

2. In the *Special Access Expanded Interconnection Order*,² we adopted rules requiring certain incumbent local exchange carriers (LECs), including the Ameritech Operating Companies (Ameritech), to offer physical collocation to competitive access providers (CAPs) for the provision of special

¹ *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, FCC 97-208 (released June 13, 1997) (*Physical Collocation Investigation Final Order*).

² *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*), recon. 8 FCC Rcd 127 (1992) (*First Special Access Reconsideration Order*) further modified on recon. 8 FCC Rcd 7341 (1993) (*Second Special Access Reconsideration Order*), vacated sub nom. *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

access.³ We later extended this requirement to switched transport services.⁴ The LECs subject to the expanded interconnection rules filed tariff revisions offering physical collocation service, and the Common Carrier Bureau (Bureau) suspended those filings and initiated an investigation.⁵

3. The Commission completed this investigation in the *Physical Collocation Investigation Final Order*, released on June 13, 1997. In that Order, we noted that it is our policy that LECs may not recover, without justification, a greater share of overhead costs from physical collocation rates than they do from rates for comparable services.⁶ We also noted that we applied this standard in the *Virtual Collocation Phase I Order*.⁷ We explained further that, without this overhead loading standard, LECs could create a barrier to competitive entry into the interstate access market, and thus frustrate our policy of promoting such entry.⁸

4. Pursuant to the *Physical Collocation Investigation Final Order*, for each physical collocation service DS1 rate element, each LEC was required to reduce its rates to reflect the lower of: (1) the overhead loading factor assigned to each particular physical collocation service DS1 rate element; or (2) the lowest overhead loading factor reflected in its rates for any comparable DS1

³ The expanded interconnection requirement is limited to Class A LECs, also known as Tier 1 LECs, that do not participate in National Exchange Carrier Association (NECA) pools. Formerly, we defined Class A LECs as LECs with annual revenues greater than \$100 million in revenue. In 1996, we adopted rules adjusting the threshold for Class A classification for inflation. See Section 32.11(a) of the Commission's rules, 47 C.F.R. § 32.11(a); *Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications*, CC Docket No. 96-193, 11 FCC Rcd 11716, 11721-22 (paras. 10-12) (1996).

⁴ *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (*Switched Transport Expanded Interconnection Order*).

⁵ *Ameritech Operating Companies, et al.*, CC Docket No. 93-162, Order, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Physical Collocation Suspension Order*).

⁶ We originally adopted this policy in the *Special Access Expanded Interconnection Order* and affirmed it in the *Virtual Collocation Order*. See *Physical Collocation Investigation Final Order* at para. 308, citing *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7429 (para. 128); *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5189 (para. 128) (*Virtual Collocation Order*).

⁷ *Physical Collocation Investigation Final Order* at para. 308 (citing *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, CC Docket No. 94-97, Phase I, Report and Order, 10 FCC Rcd 6375, 6391-94 (1995) (*Virtual Collocation Phase I Order*)).

⁸ *Physical Collocation Investigation Final Order* at para. 308.

service.⁹ For each physical collocation service DS3 rate element, each LEC was required to reduce its rates to reflect the lower of: (1) the overhead loading factor assigned to each particular physical collocation service DS3 rate element; or (2) the lowest overhead loading factor reflected in its rates for any comparable DS3 service.¹⁰ Finally, for each physical collocation rate element that is not specifically a DS1 or DS3 service, we required each LEC to reduce its rates to reflect the lower of: (1) the overhead loading factor assigned to each particular physical collocation service DS1 rate element; or (2) the lowest overhead loading factor reflected in its rates for any of its comparable DS1 or DS3 services.¹¹

5. On the basis of responses to data requests, we found that the physical collocation overhead loadings of most LECs, including Ameritech, exceeded their overhead loadings for comparable DS1 and DS3 services without justification.¹² Accordingly, we determined that those LECs' physical collocation overhead loadings did not meet our standard, and that those LECs' physical collocation rates were unreasonably high for the period they were in effect. We required those LECs to issue refunds accordingly.¹³ In Ameritech's case, the refund period is December 15 to December 31, 1994.¹⁴

III. OVERHEAD LOADING STANDARD

6. *Pleadings.* Ameritech argues that it is not appropriate to compare its overhead loadings for comparable DS1 and DS3 services to its physical collocation overhead loadings, because Ameritech based its physical collocation overhead loading factor of 1.58 on its most recent pre-price cap cost study, while its comparable DS1 and DS3 services are governed by price cap regulation. According to Ameritech, the overhead loadings for comparable DS1 and DS3 services under price cap regulation are driven largely by market forces.¹⁵

⁹ *Physical Collocation Investigation Final Order* at para. 313.

¹⁰ *Physical Collocation Investigation Final Order* at para. 313.

¹¹ *Physical Collocation Investigation Final Order* at para. 313. We found that Ameritech of Indiana's DS3 overhead loading factor is 0.81, which would not have enabled Ameritech to recover all its DS3 direct costs in Indiana. We therefore prescribed an overhead loading factor of 1.0 for Ameritech of Indiana. *Physical Collocation Investigation Final Order* at para. 315.

¹² We found that the physical collocation overhead loadings of all LECs except Southern New England Telephone Company (SNET) were excessive, warranting refunds. *Physical Collocation Investigation Final Order* at para. 311.

¹³ *Physical Collocation Investigation Final Order* at paras. 393-95.

¹⁴ Ameritech Petition at 1-2.

¹⁵ Ameritech Petition at 2-3.

7. *Discussion.* In the *Physical Collocation Investigation Final Order*, we considered and rejected Ameritech's argument that it is unreasonable to compare overhead costs LECs recover in rates for comparable services subject to price cap regulation with overhead costs recovered in rates for physical collocation services. Specifically, we explained that price cap regulation is designed in part to prevent LECs from charging monopolistic prices for access services.¹⁶ We also explained that, absent our overhead loading policy, LECs could assign a relatively high level of overheads to the physical collocation services upon which interconnectors rely to compete with the LECs, and thus create a strong entry barrier.¹⁷ Requiring Ameritech and the other LECs to assign overheads to physical collocation services that do not exceed the overheads assigned to comparable services subject to price cap regulation helps ensure that LECs do not assign monopolistically high overheads to physical collocation service. Furthermore, we determined that a tariff investigation is not an appropriate procedural vehicle for reconsidering a Commission policy adopted in a rulemaking proceeding.¹⁸ For the same reason, a petition for reconsideration of an Order terminating a tariff investigation is not an appropriate procedural vehicle for seeking reconsideration of a Commission policy adopted in a rulemaking proceeding.

IV. RELIANCE ON VIRTUAL COLLOCATION COST SUPPORT

8. *Pleadings.* In its petition, Ameritech argues that the Commission should have used data filed in the virtual collocation investigation for the purpose of making an overhead loading prescription for physical collocation services. Ameritech notes that the Commission tentatively concluded that Ameritech's virtual collocation overhead loadings were consistent with the Commission's requirements.¹⁹ Ameritech also states that it used a 1.58 overhead loading factor to develop both its virtual collocation rates and its physical collocation rates. Further, Ameritech states that, after it filed overhead loading data in the physical collocation investigation, it updated its cost support study for submission in the virtual collocation investigation.²⁰ Ameritech argues that we should not disallow any physical collocation overhead loading costs in light of the updated cost study filed in the virtual collocation investigation.²¹

¹⁶ *Physical Collocation Investigation Final Order* at para. 312. Similarly, in the *LEC Price Cap Performance Review*, we explained that we have designed price cap regulation to replicate the effects of a competitive market, to the extent possible. *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9002 (para. 93) (1995) (*petitions for recon. pending*) (*Price Cap Performance Review*).

¹⁷ *Physical Collocation Investigation Final Order* at para. 314.

¹⁸ *Physical Collocation Investigation Final Order* at para. 312.

¹⁹ Ameritech Petition at 3-4 (citing *Virtual Collocation Phase I Order*, 10 FCC Rcd at 6411-12 (para. 97)).

²⁰ Ameritech Petition at 3.

²¹ Ameritech Petition at 3.

9. MCI maintains that it would be procedurally improper to rely on cost studies submitted in the virtual collocation investigation for purposes of prescribing overhead loading factors in the physical collocation investigation.²² MCI also observes that the Commission has not made a final determination regarding Ameritech's virtual collocation overhead loading factor, but rather made a preliminary finding, pending further review of cost support information Ameritech filed under a request for confidential treatment of the data filed in that investigation.²³ Ameritech replies that its virtual collocation cost study is relevant to its physical collocation overhead loadings even though it was filed in a different proceeding.²⁴ Ameritech also contends that, because its physical collocation cost support study is based on pre-price cap data while its virtual collocation cost support study is based on more current data, its virtual collocation study is more accurate.²⁵ Ameritech asks us to take judicial notice of virtual collocation cost support study.²⁶

10. *Discussion.* We agree with MCI that permitting Ameritech to rely on data from the virtual collocation investigation to support its physical collocation overhead loading factors is procedurally improper, because Ameritech is attempting to introduce facts that were not previously submitted in this proceeding. Under Section 1.106 of the Commission's rules, parties filing petitions for reconsideration are permitted to rely on facts not previously submitted in a particular proceeding only if: (1) facts or circumstances have changed since the last opportunity to present such matters;²⁷ (2) the facts were unknown to the petitioner until after its last opportunity to present such matters, and could not, through the exercise of due diligence, have been learned prior to such opportunity;²⁸ or (3) the Commission determines that reliance on such facts is required in the public interest.²⁹ We deny Ameritech's petition for reconsideration because the petition relies on new cost data not previously introduced in this proceeding, and the new data do not satisfy any of these criteria.

11. First, Ameritech fails to satisfy the first criterion because it cannot argue that "facts" or circumstances changed since the last opportunity to present changes on the record. We did not close

²² MCI Opposition at 1-2.

²³ MCI Opposition at 2-3 (*quoting Virtual Collocation Phase I Order*, 10 FCC Rcd at 6411-12 (para. 97)). The Bureau is currently considering whether to grant Ameritech's request for confidential treatment.

²⁴ Ameritech Reply at 2.

²⁵ Ameritech Reply at 2.

²⁶ Ameritech Reply at 2.

²⁷ Sections 1.106(c)(1) and (b)(2)(i) of the Commission's rules, 47 C.F.R. §§ 1.106(c)(1), 1.106(b)(2)(i).

²⁸ Sections 1.106(c)(1) and (b)(2)(ii) of the Commission's rules, 47 C.F.R. §§ 1.106(c)(1), 1.106(b)(2)(ii).

²⁹ Section 1.106(c)(2) of the Commission's rules, 47 C.F.R. §§ 1.106(c)(2).

the record in this proceeding until over two years after Ameritech developed the new data for the virtual collocation investigation. Although Ameritech had ample opportunity to supplement the record by filing these data, it failed to do so and it has not provided us with any explanation as to why these data were not included in the record prior to our adoption of the *Physical Collocation Investigation Final Order*.

12. Second, Ameritech fails to satisfy the second criterion established in Section 1.106, because the new "facts" Ameritech presented in its petition were already known to Ameritech, and could have been presented to the Commission in a timely manner. Ameritech has not presented any reason why it did not then supplement the physical collocation record with the new data it is attempting to introduce with its reconsideration.

13. Third, we find that it would not be in the public interest to permit Ameritech to introduce these data in the physical collocation investigation through the filing of its petition for reconsideration. Ameritech chose to base its physical collocation cost support study on pre-price cap data, which would have been at least four years old at the time the study was completed. Ameritech has not shown why it could not submit a current cost support study when it submitted data that it was required to file in the physical collocation investigation. Filing its new evidence in a timely fashion would have allowed comment by other parties prior to the termination of the physical collocation investigation. Furthermore, Ameritech is permitted, and in fact already has, submitted its new evidence within the bounds of the Commission's procedural rules by revising its physical collocation rates on a going-forward basis.³⁰ Ameritech had previously withdrawn its first physical collocation offering, and thus its refund liability is only for the period from December 15, 1994, to December 31, 1994. In addition, as MCI observes, our conclusions regarding Ameritech's virtual collocation overhead loadings are preliminary pending further analysis of Ameritech's proprietary cost support data. It would be unreasonable to revise our conclusions regarding Ameritech's physical collocation overhead loadings on the basis of those preliminary findings.³¹ Finally, in order to conduct an orderly tariff investigation, the Commission generally needs to have data submitted in a timely fashion, and Ameritech has provided no compelling reason why we should accept new data now that could have been filed in this proceeding at any time before we completed this investigation in June 1997.

³⁰ See *Ameritech Operating Companies' New Expanded Interconnection Tariff*, CC Docket No. 96-185, Order Designating Issues for Investigation, DA 97-523 (released Mar. 11, 1997).

³¹ The Bureau is currently considering whether to grant Ameritech's request for confidential treatment.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by the Ameritech Operating Companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "William F. Caton".

William F. Caton
Acting Secretary